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No. 94-1214

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

BENNY CHAN; VICTORIA CHAN, individually and as husband and wife, a marital community; VICTORIA CHAN, as Guardian Ad Litem of SAMANTHA ALEXIS CHAN, ZACHARY ALEX CHAN, and AMANDA ELIZABETH CHAN, minor children,

Petitioners,

vs.

SOCIETY EXPEDITIONS, INC., a Washington Corporation,

Respondent,

-and-

DISCOVERER, a West German Corporation, *Respondent*; HEIKO KLEIN, a West German citizen, *Defendant.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Supreme Court consider whether loss of consortium damages are recoverable by relatives of cruise ship passengers injured in non-territorial waters when such damages are uniformly barred to relatives of seamen and longshore workers injured, or killed, outside state territorial waters.

LIST OF PARTIES

Respondents Society Expeditions, Inc., *et al.* by and through its attorneys, states that it has no parents, subsidiaries or affiliates that have issued shares to the public.

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STATEMENT OF THE CASE

The facts relevant to this Petition for Writ of Certiorari are simply stated. On or about March 28, 1990, Petitioners Benny Chan, Victoria Chan and Samantha Chan embarked as passengers on a cruise aboard the cruise ship WORLD DISCOVERER. Three days later, while the ship was transitting the South Pacific Ocean, Petitioners Benny and Samantha Chan allegedly sustained personal injuries while ferrying from the WORLD DISCOVERER to shore. Upon returning to Washington State, the Chan family filed suit against Respondents, and Petitioners Victoria Chan, Samantha Chan, Zachary Chan and Amanda Chan claimed, among other damages, "loss of love, affection, companionship, support and consortium" of Benny Chan. The district court found such damages are not recoverable under the general maritime law and dismissed the "loss of consortium" claims. The Ninth Circuit upheld the district court's ruling.

SUMMARY OF THE ARGUMENT

The Question Presented by Petitioners to this Court for review, whether *Miles v. Apex Marine Corp.* was intended to bar loss of society damages in *all* maritime personal injury actions, is not ripe for review as no court, federal or state, has rendered a decision extending *Miles* to such an extent. Certainly, the Ninth Circuit Court of Appeals' decision prompting this Petition, *Chan v. Society Expeditions*, 27 F.3d 429 (9th Cir. 1994), does not suggest a legal issue of such extraordinary breadth. *Chan* merely held that family members of a cruise ship passenger injured outside state territorial waters were not entitled to recover loss of consortium damages. The case does not purport to govern the availability of damages for loss of consortium in "all" maritime personal injury matters as implied by Petitioners. Nor does the Ninth Circuit's holding in *Chan* rise to the level of "importance" called for by the rules of this Court.

The Petition does not present a sufficient basis for granting review under this Court's rules. No conflict exists between federal courts of appeal or state courts of last resort. Rule 10.1.(a), Rule 10.1.(b). Indeed, Petitioners rely primarily on trial court opinions in support of a contended conflict of authorities which, on analysis, are entirely consistent with the holding in *Chan*. Moreover, the Ninth Circuit did not decide "an important question of federal law" which should be settled by this Court. Rule 10.1.(c). Rather, the Ninth Circuit simply applied general maritime law jurisprudence, as espoused by this Court, to the narrow facts of *Chan*. The Petition should be denied.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION IN *CHAN* DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER UNITED STATES COURT OF APPEALS OR WITH ANY DECISION OF A STATE COURT OF LAST RESORT, AND THE ISSUE RAISED DOES NOT WARRANT REVIEW BY THE SUPREME COURT.

Under the Supreme Court's "Considerations Governing Review on Writ of Certiorari", Rule 10, this Petition lacks merit for review. The Rules of the Supreme Court plainly state that "a petition for certiorari will be granted only when there are special and important reasons." Rule 10. Rule 10 offers further guidance by declaring the "character" of reasons that will be considered by the Court in reviewing a petition for writ of certiorari. Those are summarized as follows:

> (1) a conflict exists between United States Courts of Appeals, Rule 10.1.(a); or

(2) a conflict exists between two state courts of last resort, Rule 10.1.(b); or

(3) a United States Court of Appeal has decided an important question of federal law which has not been, but should be, decided by this Court. Rule 10.1.(c).

None of these considerations are raised in this Petition.

The Ninth Circuit's *Chan* decision ruled on the recoverability of consortium damages for family members of a passenger injured outside of state territorial waters. Even Petitioners concede this point when they confess, "No post-Miles decision has been found involving the injury or death of a cruise ship passenger." (Pet. Brief, p. 9). Rule 10.1.(a) is therefore not invoked by this Petition.

Rule 10.1.(b) is also inapplicable to this Petition as is evident from the lack of *any* state court of last resort citations in Petitioners' Brief.

Petitioners are therefore left having to persuade this Court that the *Chan* opinion raises an "important" issue that the Court "should" decide under Rule 10.1.(c). But, tacitly recognizing the minor importance of the narrow *Chan* holding, Petitioners aim to tempt this Court by formulating an issue far beyond the scope of the issue decided in the Ninth Circuit's *Chan* decision. The Ninth Circuit did not interpret *Miles* as intending "to bar loss of society damages in all maritime personal injury actions" as suggested by Petitioners' Question Presented. Rather, the *Chan* decision stands for the narrow and unremarkable proposition that derivative claims for loss of consortium damages are not available to family members of a passenger whose injury occurs outside state territorial waters. As is outlined below, the Ninth

Ninth Circuit's opinion in *Chan* is entirely consistent with the decisions of this Court.

As the remainder of this Brief in Opposition will point out, this Petition is both premature and lacking the importance called for by this Court's jurisdictional mandate. Accordingly, the Petition should be denied.

II.

THERE IS NO GENERAL MARITIME LAW CAUSE OF ACTION FOR LOSS OF CONSORTIUM FOR ANY CLASS OF INDIVIDUAL (SEAMEN, LONGSHOREMEN OR PASSENGERS) ARISING FROM DEATH OR INJURY OCCURRING OUTSIDE TERRITORIAL WATERS.

For the past 30 years, a body of federal maritime case law (including four cases from this Court) has uniformly rejected derivative claims for loss of consortium arising from injuries or deaths beyond territorial limits. In holding such claims unavailable to family members of passengers injured outside territorial waters, the Ninth Circuit's decision in *Chan* harmonizes perfectly with this consistent body of law. A historical review of the case law will highlight the appropriateness of the Ninth Circuit's holding, as well as the failings of this Petition.

In 1963, the recoverability of loss of society/consortium damages under the general maritime law was addressed by the Second Circuit in *Igneri v. Cie. de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963). In *Igneri,* a longshoreman injured on a ship in Brooklyn Harbor brought suit for his own injuries. His wife, a party plaintiff, claimed for loss of consortium. The wife's claim "presented for the first time in a Federal Court of Appeals" the issue of consortium damages. *Id.* at 258. *Igneri,* with its

complete historical review and analysis of consortium claims under common law and as applied to maritime law, established the seminal rule that in personal injury actions under general maritime law, the spouse may not recover for loss of consortium. *Id.* at 267.[1] In reaching its decision, the Second Circuit stated:

> Perceiving the anomaly in the rule which forbade a seaman, but not a harbor-worker, to recover for negligence against a ship, Congress largely ended the discrimination against seamen by passing the Jones Act; we should not create a new anomaly by giving the harbor-worker's wife a claim denied to the seaman's.

Id. at 207. The Second Circuit concluded that "the scheme of remedies, statutory and judicial, for injury to . . . maritime workers limits recovery to the person directly injured." *Id.* at 268. The court was persuaded by the absence of a then-existing generally recognized common law right of wives to recover loss of consortium, and, by analogous federal statutes relating to seamen (Jones Act, 46 U.S.C. § 688) and longshoremen (Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950), both of which bar damages for loss of consortium.

Over the next twenty-seven years, this Court, on four occasions, analyzed the availability of loss of consortium damages in maritime causes of action, and except for a minor deviation, left intact the general underpinnings of *Igneri.* The Court's first holding in this area came in *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), where this Court held that the widow of a longshoreman killed *in territorial waters* could

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1. Consortium was defined as "the mutual right of the marriage partners to each other's society, companionship, and affection, including sexual intercourse." *Id.* at 260 n.2.

recover non-pecuniary damages for loss of society in a wrongful death action based on unseaworthiness.[2] In reaching its conclusion, a scant majority (5-4) of the Court declined to follow the guidance of the Death On The High Seas Act ("DOHSA"), 46 U.S.C. § 761, which expressly limits recovery for claims involving death beyond territorial boundaries. A vigorous dissent disputed the propriety of permitting recovery of loss of society damages, in part because permitting such recovery represented a "repudiation of the Congressional purposes expressed in the two federal maritime wrongful death statutes [the Jones Act and DOHSA]." *Id.* at 605.[3]

Four years later, this Court revisited the issue in order to determine whether the beneficiaries of a passenger killed in a helicopter *outside territorial waters* could recover *Gaudet* loss of society damages. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978). Confronted with a choice between "the rule chosen by Congress in 1920 [DOHSA] or the rule chosen by this Court in *Gaudet,*" *Id.* at 623, the Court chose the former and held that the survivors of a decedent whose death occurred *outside state territorial waters* could not recover loss of society damages under general maritime law. *Id.* at 623-624. The Court found Congress, in enacting DOHSA, had expressly limited survivors' recovery to pecuniary losses. *Id.* at 623.

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2. *Gaudet* came in the wake of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which recognized for the first time a longshoreman's right to recover for wrongful death under the general maritime law, but which left open the question of recoverable elements of damages for this new cause of action.

3. The Supreme Court later addressed the availability of non-pecuniary damages in the context of a longshore worker injured in territorial waters. *American Export Lines, Inc. v. Alvez,* 446 U.S. 274 (1980). In reaching its result, the Court simply followed its reasoning in *Gaudet* and permitted the analogous type of non-pecuniary damages for loss of society to the spouse of an injured longshore worker. *Alvez, Id.* at 281.

The Supreme Court reconciled *Higginbotham* with *Gaudet* by limiting the application of *Gaudet* to deaths occurring in territorial waters. That is, a passenger's spouse may only recover for loss of society in a wrongful death action if the fatality occurred while traveling on territorial waters. 436 U.S. at 623. The Court recognized that its ruling created an anomaly in the sense that the spouse of a passenger killed within state territorial waters as a result of the vessel's unseaworthiness would be able to recover for loss of society, pursuant to *Gaudet*, but the spouse of a passenger killed under identical circumstances outside state territorial waters would have no claim for loss of society, under *Higginbotham*. *Id.* at 624. Even so, the Court found DOHSA could not be overlooked. *Id.*

As of 1980, the Supreme Court had rendered three decisions regarding loss of society/consortium in the context of an admiralty action. Two of those decisions, *Gaudet* and *Alvez*, 446 U.S. 274 (1980), permitted the recovery of loss of consortium damages in actions involving longshoremen, killed or injured, within state territorial waters. The other decision, *Higginbotham*, denied such recovery in an action involving a passenger killed outside state territorial waters. Although *Higginbotham* revitalized maritime statutory remedies, it also created a dichotomy in maritime law. Specifically, DOHSA limited recovery for deaths occurring on the high seas to pecuniary damages, even in cases involving seamen — traditional wards of admiralty. However, recovery for deaths occurring in territorial waters were subject to the *Gaudet* rule, which allowed recovery for loss of society and similar non-pecuniary loss.

The Supreme Court addressed this dichotomy in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In *Miles*, parents of a murdered seaman brought a wrongful death action seeking, *inter alia*, punitive damages and loss of society. The seaman's parents sought recovery under the Jones Act, the doctrine of unseaworthiness and the general maritime law. Affirming the

judgment of the Court of Appeals, this Court held that the parents were *not* entitled to loss of society damages. Reminiscent of the dissent in *Gaudet,* the Court acknowledged the expressions of Congressional policy and intent embodied in DOHSA and the Jones Act, both of which disallow non-pecuniary damages.[4] Recognizing that it "sailed in occupied waters," *Id.* at 36, the Court declined to create a judicial remedy inconsistent with Congress' statutory pronouncements in the area, stating:

> Our decision also remedies an anomaly we created in *Higginbotham.* Respondents in that case warned that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial waters, where loss of society was available under *Gaudet,* and deaths on the high seas. We recognize the value of uniformity, but concluded that a concern for consistency could not override the statute. *Higginbotham,* 436 U.S. at 624. Today we restore a uniform rule applicable to all actions for wrongful death of a seaman, whether under DOHSA, the Jones Act, or the general maritime law.

Id. at 33. The Court did not stop at denying such recovery, but went one step further by limiting the reach of *Gaudet,* and implicitly of *Alvez,*[5] stating, "[T]he holding of *Gaudet* applies

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4. DOHSA expressly limits recovery to pecuniary damages. The Jones Act's limitation is imposed by the judicial interpretation of FELA, which, the Court concluded, Congress had incorporated into the Jones Act. 498 U.S. at 32, *citing, Michigan Central R.R. v. Vreeland,* 227 U.S. 59 (1913) (construing FELA as restricting recovery to pecuniary loss).

5. *Miles* presumably placed the same restriction on *Alvez* because that opinion merely extended *Gaudet* to personal injury actions not involving death.

only in territorial waters and it applies only to longshoremen." *Id.* at 31.

As the above historical discussion illustrates, the general maritime law, as interpreted by this Court, does not recognize a right to recover for loss of society in most maritime actions. *Alvez*, 446 U.S. at 280. Moreover, the right to recover for loss of society under the general maritime law is today limited to territorial waters and to the very narrow facts of *Alvez* and *Gaudet*.[6] The Ninth Circuit's decision below is entirely consistent with the uniform body of maritime law regarding death and injury cases arising *outside* territorial waters.

III.

THE NINTH CIRCUIT'S DECISION IS THE CORRECT APPLICATION OF THE GENERAL MARITIME LAW TO FACTS OF *CHAN*.

Following *Miles*, numerous courts have attempted to apply the mandate of the general maritime law, as espoused by the above decisions, to various classes of individuals who transit territorial and non-territorial waters with (as Petitioners correctly point out) varying results. The results have been unvarying, however, in denying claims for loss of consortium arising out of injury and deaths beyond territorial limits. In reaching its decision, the Ninth Circuit relied heavily on the situs of Mr. Chan's injuries, non-territorial waters, and noted:

> The Fifth Circuit recently relied on this uniformity rationale in *Nichols v. Petroleum*

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6. It should be noted that *Gaudet* is inapplicable on its facts after the 1972 amendments to the LHWCA. The plaintiff in *Gaudet* would possess only an action for negligence against the vessel owner, not for unseaworthiness.

> *Helicopters,* 17 F.3d 119 (5th Cir. 1994), to hold that loss of consortium damages are unavailable in an action brought by the spouse of a longshoreman injured on the high seas. *Id.* The *Nichols* court noted that although *Gaudet* allowed the recovery of loss of consortium damages, the Supreme Court subsequently limited *Gaudet* to its facts, and it now applies "only in territorial waters, and [] only to longshoremen." *Id.* at 122 (citing *Miles,* 498 U.S. at 31). Because the longshoreman in *Nichols* had been injured eighty miles off the coast, outside of territorial waters, the Fifth Circuit ruled that his claim for loss of consortium damages failed to satisfy one of the two equally important requirements of *Gaudet,* and therefore must fail. *Id.* at 123. As noted, Benny Chan's injury also occurred on the high seas, and thus fails to satisfy one of the two requirements of *Gaudet.* In the interest of consistency as discussed in *Miles,* we hold that damages for loss of consortium are unavailable in this instance. For these reasons, we affirm the district court's dismissal of the dependent plaintiffs' loss of consortium claims.

Thus, the Ninth Circuit simply (and correctly) applied existing law (no recovery of loss of consortium damages except for injury or death of longshoreman occurring in territorial waters), to the facts (passenger injured on non-territorial waters). No apparent reason exists to differentiate between fatal and non-fatal injuries in rejecting damages for loss of society. As the Ninth Circuit correctly noted, it would be non-sensical to hold that the spouse of a non-fatally injured passenger should have greater

rights than the spouse of a fatally injured passenger. Finally, Petitioner's argument would lead to the anomalous result that seamen — those entitled to the greatest protection under maritime law — would be afforded a lesser remedy than non-seamen. Obviously, such an argument makes no sense and would violate the policy mandates of this Court: awarding special protection to seaman.

IV.

GENERAL MARITIME LAW, BOTH STATUTORY AND JUDGE-MADE, HAS LONG RECOGNIZED DIFFERENT REMEDIES BASED ON THE LOCATION OF THE CASUALTY.

Congress and this Court have long recognized an important distinction between accidents occurring in state territorial waters versus those occuring in non-territorial waters. In passing the DOHSA, Congress specifically mandated varying remedies based on the location of the fatality. This Court followed Congress' lead in *Gaudet,* where it observed:

> Congress' insistence that the Act not extend to territorial waters [citations omitted] indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act.

Gaudet, 414 U.S. at 588, n. 22.

The Court again recognized the distinction between territorial and non-territorial waters in *Higginbotham*, stating:

> We recognize today, as we did in *Moragne*, the value of uniformity, but a ruling that DOHSA governs wrongful-death recoveries on the high seas poses only a minor threat to the uniformity of maritime law. Damages aside, none of the issues on which DOHSA is explicit have been settled to the contrary by this Court in either *Moragne* or *Gaudet*. Nor are other disparities likely to develop. As *Moragne* itself implied, DOHSA should be the courts' primary guide as they refine the non-statutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right. It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute.

Higginbotham, 436 U.S. at 624 (footnotes omitted).

The Fifth and the Ninth Circuits are both in accord with Congress and this Court in providing differing treatment based on location of the casualty. The Fifth Circuit's confirmation is apparent in two recent decisions: *Randall v. Chevron*, 13 F.3d 888 (5th Cir. 1994) and *Nichols v. Petroleum*, 17 F.3d 119 (5th Cir. 1994). Both cases involved the death of a longshoreman: one killed in state territorial waters (*Randall*), one killed outside territorial waters (*Nichols*). *Randall* explicitly followed *Gaudet*, and permitted the recovery of loss of society damages, whereas *Nichols* denied recovery, and in doing so, stated:

> The Supreme Court's explicit limitation of *Gaudet* to its facts, as well as its implicit limitation to *Alvez* to its facts as interpreted by this Court, indicates that the Supreme Court did not intend to overrule *Gaudet* or *Alvez*. As a result, we are unable to extend the uniformity rule of *Miles* to longshoremen killed or injured in territorial waters. *Therefore, an inconsistency remains between deaths and injuries of longshoremen in territorial waters, where loss of consortium is available under Gaudet* and *Alvez, and death and injuries of longshoremen on the high seas.*

Nichols, 17 F.3d at 123 (emphasis added). In applying the law to the *Nichols'* facts, the Fifth Circuit noted that the injuries were sustained some eighty (80) miles off the Louisiana coast, outside territorial waters. Thus, the court held the claim for loss of consortium damages failed to satisfy one of the two equally important requirements of *Gaudet* and *Alvez*, as limited by *Miles*.

The Ninth Circuit recently followed the same proscription in both *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994) and *Chan*. In *Sutton*, passengers of a pleasure boat were killed within territorial waters. In allowing representatives of the decedents to recover loss of consortium damages, the Ninth Circuit found: "[I]t is clear enough . . . that the Court left the law applicable to territorial-water . . . where it found it." *Id.* at 916. Conversely, when the casualty occurred outside territorial waters, the same court found that Petitioners' injuries failed to satisfy the situs requirement of *Gaudet*. (Pet. App., p. 52). Not only is there no conflict between the circuits, the only two circuits to have thoroughly analyzed the

question (the Fifth and the Ninth) have reached absolutely consistent results.

Petitioners have not cited a single case in opposition to this consistent body of maritime law.

V.

PETITIONERS ARE ASKING THIS COURT TO CREATE A REMEDY WHERE NO FEDERAL CIRCUIT OR DISTRICT COURT HAS CHOSEN TO DO SO.

In an effort to create a conflict militating in favor of this Writ's acceptance, Petitioners cite numerous post-*Miles district* court cases both allowing and disallowing loss of consortium damages for maritime injuries and deaths. At first blush, these trial court decisions may seem to support Petitioners' argument that the courts are handing out inconsistent holdings regarding availability of loss of consortium damages. But a detailed examination of *all* post-*Miles* decisions (including those cited by Petitioners) highlights a consistency not appreciated by Petitioners.

Every single case cited by Petitioners for the proposition that loss of consortium damages are recoverable involves either a death or injury which occurred in *territorial* waters. *Sutton,* 26 F.3d at 914-917; *Randall,* 13 F.3d at 903; *Powers v. Bayliner Marine Corp.,* 855 F. Supp. 199 (W.D. Mich. 1994); *Garner v. Dravo Basic Materials Co.,* 768 F. Supp. 192 (S.D. W. Va. 1991); *In re Morehead Marine,* 844 F. Supp. 1193 (S.D. Ohio 1994); *Emery v. Rock Island Boatworks, Inc.,* 847 F. Supp. 114 (C.D. Ill. 1994); *Schumacher v. Cooper,* 850 F. Supp. 438 (D. S.C. 1994); *Rebstock v. Sonate Offshore Drilling,* 64 F. Supp. 75 (E.D. La. 1991); *Sugden v. Puget Sound Tug & Barge Co.,* 796 F. Supp. 455 (W.D. Wash. 1992); *Petition of Cleveland Tankers, Inc.,* 843 F.

Supp. 1157 (E.D. Mich. 1994); *Ferrara v. Fukuoka Senpaqu K.K.*, 1991 A.M.C. 2249 (D.C. Mass. 1991). No decision since *Miles* has allowed recovery of loss of consortium damages where the injury or death occurred in non-territorial waters. *See Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994) (family members of longshoreman injured outside territorial waters not entitled to recover loss of consortium damages); *Carnival Cruise Lines v. Red Fox Industries, Inc.*, 813 F. Supp. 1185 (E.D. La. 1993) (family members of seaman killed outside territorial waters not entitled to recover loss of society damages); *In re Waterman Steamship S.S. Corp.*, 780 F. Supp. 1093 (E.D. La. 1992) (family members of seaman killed outside territorial waters not entitled to recover loss of consortium damages.

CONCLUSION

Petitioners frame an issue which is far beyond the scope of the Ninth Circuit's ruling in *Chan* and which fails to meet any of this Court's criteria for review. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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